83-No. 1213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: GRAND JURY
EMPANELLED MARCH 8, 1983

JACOB F. BUTCHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under any circumstances, the act of producing documents of a corporation can be testimonial, communicative and incriminating for an individual to whom a subpoena duces tecum has been issued.

2. Whether the Court of Appeals for the Sixth Circuit has the authority and/or power to grant immunity for the act of producing documents even though immunity has not been granted by the Executive Branch under the provisions of 18 U.S.C. §§ 6002, 6003.

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The petitioner Jacob F. Butcher respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 23, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (App. A). The United States District court for the Eastern District of Tennessee issued two separate orders and an opinion from the bench in these proceedings. Both orders and the opinion from the bench are in the Appendix (App. B).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 23, 1983. This petition was filed within 60 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.— No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except, in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18

§ 6002

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT OF THE CASE

On June 2, 1983, a Federal Grand Jury for the Eastern District of Tennessee, Northern Division, issued a subpoena commanding Mr. Butcher, the appellant, to produce records of the following companies:

JFB Petroleum and Land Company
Bull Run Oil Company
Church Petroleum Marketers, Inc.
Seaboard Trading Company
Southern Natural Resources
Tri-State Mining Company, Inc.
Cumberland Land and Mining Company, Inc.
Natural Energy Mining Company, Inc.

By agreement of counsel, the return date for the subpoena was extended to July 19, 1983. On July 18, 1983, Mr. Butcher, acting through counsel, moved to quash the subpoena on the grounds that forced production of the records would violate his right against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States.

Judge Robert Taylor held a hearing on the Motion to Quash on July 19, 1983. At the hearing, the government clarified the subpoena by stating that it sought only corporate records. In response, counsel for Mr. Butcher argued that the mere act of producing the corporate records would be incriminating. Counsel for Mr. Butcher proffered an *in camera* submission, consisting of an affidavit and a memorandum, explaining and outlining the reasons why, in this instance, the mere act of production would be testimonial and incriminating. The government opposed such a submission and argued that under no circumstances could the mere act of production of the records requested be incriminating.

Judge Taylor refused to quash the subpoena and refused to accept and consider the proposed *in camera* submission. Thereafter, Mr. Butcher, acting on advice of counsel, respectfully declined to produce the records. Mr. Butcher was then held in contempt of court and remanded to the custody of the Attorney General. Enforcement of the order of confinement was stayed pending appeal.

On appeal to the United States Court of Appeals for the Sixth Circuit, Mr. Butcher argued that, under the facts and circumstances of this case, the mere act of producing corporate documents would be incriminating. He pointed out that the government had not established that he was the custodian of any of the records subpoenaed. In fact, the government failed to establish that three of the entities involved were corporations. Mr. Butcher merely sought a chance to make an *in camera* submission to the district court detailing the basis for his claims of privilege.

The government argued that Mr. Butcher must produce all corporate records in his possession, irrespective of whether the act of production or the admission that he possessed the documents would be incriminating. The government further argued that Mr. Butcher must give sworn testimony that he did not possess those documents not produced but requested.

The Sixth Circuit Court of Appeals held that the production of corporate records could never satisfy either "the requirement that the act be testimonial nor that it be self-incriminating." (App. A-4). Then, cryptically, at the end of its opinion, the court indicated that the government could not "attempt to convert the act of production into a self-incriminating testimonial act." (App. A-6).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions Of The Court Of Appeals For The Second Circuit, With The Position Taken By The Government In Another Case Under Consideration By This Court, And With The Reasoning Of *Fisher* v. *United States.*

In *Fisher* v. *United States,* 425 U.S. 391 (1976), this Court shifted the Fifth Amendment analysis of documentary subpoenas from the "private papers" analysis of *Boyd* v. *United States,* 116 U.S. 816 (1886), to an analysis of whether the act of producing the documents themselves is compelled, testimonial, communicative and incriminating without regard to the contents of the documents. *See Fisher, supra,* 425 U.S. at 408. In its decision in this case, the Court of Appeals for the Sixth Circuit failed to follow this shift in analysis. Drawing upon principles established in the line of cases following *Boyd,* the Sixth Circuit held that the act of producing corporate records can never be testimonial and communicative.

In its opinion, the Sixth Circuit attempted to distinguish *In Re Grand Jury Proceedings (Katz),* 623 F.2d 122 (2d Cir. 1980), on the grounds that the subpoena in question in that case could have sought the records of sole proprietorships as well as corporate records. (App. A-5-6). In *In Re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983,* No. 83-6256 (2d Cir. Nov. 1, 1983), however, the Second Circuit made it clear that the mere act of production of documents which are exclusively corporate documents could be testimonial, communicative and incriminating. (App. C A-22-23). The Second Circuit accepted the same argument the Sixth Circuit rejected—that if the mere act of producing the documents would admit the existence of documents not known to exist by the government or would admit that the documents are in a person's possession, then the possessor would be forced to be a witness against himself in violation of the Fifth Amendment.

(App. C A-22-23). As a result, the Second and Sixth Circuits are clearly in conflict on the issue of whether the act of producing corporate documents can ever be protected under the Fifth Amendment.

Clearly the position taken both by Petitioner and by the Second Circuit is logically consistent with the act of production analysis contained in *Fisher*. The Sixth Circuit's analysis, on the other hand, is logically inconsistent with the *Fisher* analysis. The central inquiry, according to *Fisher*, is whether the mere act of production is testimonial, communicative and incriminating. If so, the act of production is protected under the Fifth Amendment. Under the *Fisher* analysis the contents of the documents are irrelevant. If the act of production adds to the sum total of the government's information, and is incriminating, it is privileged.

A comparison of the language in the opinion of the Sixth Circuit in this case with the language of the opinion of the Second Circuit in *In re: Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, demonstrates the clear conflict between the decisions of the two circuits. In its decision in this case the Sixth Circuit held:

> The appellant makes much of the fact that the government is not certain that all the documents sought from him are in existence. He argues that *Fisher* and *Schlansky [United States* v. *Schlansky*, 709 F.2d 1079 (6th Cir. 1983)] would have been decided in favor of the taxpayers if the IRS had not known of the existence of all the records it sought and clearly identified them in the subpoenas and summonses. This overlooks, again, the fact that the documents sought in the two cited cases were personal records. Because they were personal records the very act of producing them might have provided a necessary link between the taxpayer and the records. The production of the records of a corporation, standing alone, *does no more than signify that the person who produces them has them*

> *in his possession,* necessarily in a representative capacity since corporations can act only through representatives, and that he believes the records produced are those described in the order of production.

(App. A-6) (emphasis added). In *In re: Grand Jury Subpoenas Duces Tecum Dated June 13, 1983, and June 22, 1983,* on the other hand, the Second Circuit stated:

> For the purpose of determining the extent to which a natural person may invoke his Fifth Amendment privilege under *Fisher,* the fact that the subpoenaed documents in his possession were prepared by a corporation is not directly relevant. The *Fisher* doctrine simply does not turn on either content or authorship of the documents; it is the fact, and the circumstances, of possession that are controlling. *Couch* v. *United States, supra.* If, as the Supreme Court indicated in *Fisher,* the act of production doctrine applies to one type of otherwise unprivileged document (accountant's workpapers) it can apply as well to corporate records in an individual's possession.

(App. C A-23-24).

Moreover, the position taken by the government in this case as well as the decision of the Sixth Circuit is at odds with the position taken by the government during oral argument before this Court in *United States* v. *Doe,* 680 F.2d 327 (3d Cir. 1982), *cert. granted* 51 U.S.L.W. 3789 (May 2, 1983) (oral argument reported at 34 Crim. L. Rptr. 4130-4131). From the report of the argument, it appears that Mr. Alito, arguing for the Solicitor General's office, agreed with Justice Brennan that if there were a question as to who the owner of a particular company was, the mere act of production would be incriminating for the sole proprietor. Later, Mr. Alito stated that there was no reason to distinguish between a corporation and a sole proprietorship in the case involved.

Ironically, the major thrust of Mr. Butcher's argument is that, by producing the documents subpoenaed, he will establish his connection with those entities whose documents are in his possession and will thereby incriminate himself. The government has not, in these proceedings, established that Mr. Butcher is connected with these entities. In fact, the government has not even demonstrated that all of the entities involved are corporations. Mr. Butcher merely requests that he be given the opportunity to produce evidence *in camera* to support his Fifth Amendment assertions. That request was denied by the District Court and the Sixth Circuit. The refusal to consider the basis for Mr. Butcher's claims of privilege for the act of production is clearly inconsistent with the reasonsing of *Fisher* and the holding of the Second Circuit in *In Re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983.*

This Court should grant certiorari to review the judgment of the Sixth Circuit in this case in order to resolve these conflicts.

2. **The Attempt By The Court Below To Provide Immunity For The Act Of Production Is Inconsistent With The Reasoning Of Its Own Decision And With 18 U.S.C. § 6001 *et seq.***

At the end of its opinion in this case, the Sixth Circuit stated:

> Any subsequent attempt by the government to convert the act of production into a self-incriminating testimonial act would be subject to a Fifth Amendment challenge. As we pointed out in *Schlansky*,
>
> > If the government should attempt to authenticate the binder and its contents as evidence in subsequent criminal proceedings with proof that they were produced by the taxpayer, a Fifth Amendment objection could be interposed at that time. Such proof would seek to add testimonial value to the otherwise testimony-free act of production.

709 F. 2d at 1083.

(App. A-6, *quoting United States* v. *Schlansky, supra*).

By this statement, the Sixth Circuit implicitly has conceded that the act of production is at least potentially incriminating in this case, *i.e.*, that it could be used against Mr. Butcher in a criminal proceeding. This is, of course, the crux of Mr. Butcher's argument—an argument the Sixth Circuit rejected earlier in its opinion.

Rather than quashing the subpoena, the Sixth Circuit has offered some variety of quasi-immunity for the act of production. The Sixth Circuit has indicated that the act of production cannot be used against Mr. Butcher in a subsequent criminal proceeding and, apparently, has thereby attempted to provide some limited immunity for the act of production.

Such purported immunity is unsatisfying on two levels. First, the Sixth Circuit's attempt to create immunity is ineffective. Granting immunity for providing testimony or other information (books, papers, documents, records, etc.) is governed by statute. The decision to grant or deny immunity is committed to the sole discretion of the Executive Branch under 18 U.S.C. § 6001 *et seq*. The courts have no power to grant immunity. *United States* v. *Lenz*, 616 F.2d 960 (6th Cir.), *cert. denied* 447 U.S. 929 (1980). Thus, the Sixth Circuit's attempt to grant immunity does no more than provide Mr. Butcher with an illusory—and temporary—sense of security.

Second, the Sixth Circuit's decision is itself a violation of Mr. Butcher's Fifth Amendment privilege. The decision clearly acknowledges that the act of production could be incriminating (since it contemplates an objection founded on the Fifth Amendment), yet the Sixth Circuit has ordered Mr. Butcher to produce those records in his possession or face contempt charges. The Sixth Circuit's refusal to follow the principles established in *Fisher*, its refusal to allow the petitioner to

demonstrate the basis for his claim of privilege, the clear inconsistency between its grant of quasi-immunity and 18 U.S.C. § 6001 *et seq.*, and the inconsistency of its own reasoning cannot be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 83-5508

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: Grand Jury
Empaneled March 8, 1983.

Appeal from the United States District Court
for the Eastern District of Tennessee

Decided and Filed November 23, 1983

Before: Lively, Chief Circuit Judge; Krupansky, Circuit Judge; and Cook, District Judge.*

Lively, Chief Circuit Judge. The appellant Jacob J. Butcher was served with a subpoena duces tecum to appear before a federal grand jury in the Eastern District of Tennessee. The subpoena ordered Butcher to produce specified financial and other business records of eight named companies. Butcher moved to quash the subpoena on the ground that the act of producing the records would violate his Fifth Amendment privilege against compelled self-incrimination. The government made it clear at a hearing that it sought only corporate records. It was also disclosed at the hearing that the government had not located incorporation records of three of the eight companies.

Butcher conceded at the hearing that the contents of corporate records are not privileged under the Fifth Amendment.

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* The Honorable Julian A. Cook, Jr., Judge, U.S. District Court for the Eastern District of Michigan, sitting by designation.

However, he contended that he was protected by the Fifth Amendment from the act of producing the records, arguing that this act in itself would be testimonial and incriminating. The district court denied the motion, holding that since the documents sought were corporate records held by the privilege. The district court also denied Butcher's request to be permitted to submit an affidavit and memorandum *in camera* setting forth the reasons why the act of production, in itself, would be testimonial and incriminating.

Butcher then appeared before the grand jury, but failed to produce the subpoenaed records, asserting Fifth Amendment grounds. He was held in contempt and remanded to the custody of the Attorney General until he complies with the district court's order. Enforcement of the order of confinement was stayed by the district court to give Butcher an opportunity to appeal its decision.

On appeal Butcher maintains that the district court erred in denying the motion to quash and in refusing to consider *in camera* his proffered affidavit and memorandum. He relies principally upon *Fisher* v. *United States,* 425 U.S. 391 (1976), and *United States* v. *Schlansky,* 709 F.2d 1079 (6th Cir. 1983), in support of both claims of error. There is no dispute that *Fisher* established the proposition that the very act of producing documents may be testimonial and incriminting, and if production is compelled, may be entitled to Fifth Amendment protection. This is true regardless of whether the contents of the documents are incriminating. This court discussed and applied *Fisher* in *Schlansky,* and Butcher relies on the following language from our opinion:

> The central issue is no longer the nature of the materials whose production is compelled. Instead, the question is whether their production involves testimonial communication on the part of the person to whom the summons or subpoena is directed.

709 F.2d at 1082. Butcher argues from this quotation that the Fifth Amendment privilege applies to the act of producing corporate records as well as the act of producing personal records. On the basis of language in *Fisher* and *Schlansky* he also maintains that he was entitled to establish that the facts and circumstances of this case would make the act of production both testimonial and incriminating. Since an open showing of these facts and circumstances would nullify the privilege, he contends that the district court erred in refusing his *in camera* submissions.

We believe the appellant misreads *Fisher* and *Schlansky*. Both cases involved documents which were the property of the person under investigation. In *Fisher* the records had been prepared by an accountant and delivered to the taxpayer. The taxpayer, after he knew he was the subject of an income tax investigation, delivered the papers to an attorney who was to represent him in connection with any tax disputes. An IRS summons was served on the attorney who claimed a Fifth Amendment privilege against producing the records in compliance with the summons. The Supreme Court held that the attorney could not claim a privilege on behalf of the client, and the client would have had no Fifth Amendment privilege against the act of producing the documents if the summons had been served on him. The Court stated that it was doubtful that the act of production, even if implicitly admitting the existence and possession of the papers, would rise to the level of testimony within the protection of the Fifth Amendment. 425 U.S. at 411. Since the records sought were prepared by the accountant, their production by the taxpayer would not serve to authenticate them. It would "express nothing more than the taxpayer's belief that the papers are those described in the subpoena." *Id.* at 413

Throughout the *Fisher* opinion the Supreme Court emphasized that the subpoena did not seek production of the taxpayer's "private papers." *E.g., id.* at 414 ("for the papers demanded here are not his 'private papers.' "). Prior to *Fisher* the

Supreme Court held in a line of cases that a person who holds documents of a collective entity in a representative capacity may be compelled by subpoena or summons to produce those documents even though they may incriminate the person required to produce them. *See, e.g., Bellis* v. *United States,* 417 U.S. 85 (1974) (partnership); *United States* v. *White,* 322 U.S. 694 (1944) (unincorporated association); *Dreier* v. *United States,* 221 U.S. 394 (1911) (corporation—subpoena directed to corporate officer); *Wilson* v. *United States,* 221 U.S. 361 (1911) (corporation—subpoena directed to corporation). Rather than retreating from these holdings in *Fisher* the Court reaffirmed them. 425 U.S. at 411-12.

In *Schlansky* the IRS summons was directed to the taxpayer rather than to his accountant or attorney. Again the documents sought were the personal property of the person under investigation, not those of a corporation or other collective entity. After approving the *in camera* inspection of the documents to determine whether the act of production would indeed be testimonial and incriminating as the taxpayer claimed, this court affirmed the district court's denial of a motion to quash the summons. The *in camera* inquiry was required because there was a possibility that the act of production would supply a necessary connection between these personal documents and the taxpayer. Such a connection might be self-incriminating. If testimonial in nature, production under these circumstances could not be compelled.

We do not believe that the mere act of producing corporate records satisfies the three criteria for protection under the Fifth Amendment. The criterion of compulsion is satisfied, but the mere act of producing the records of some entity rather than the personal papers of the person subpoenaed satisfies neither the requirement that the act be testimonial nor that it be self-incriminating. At most the act of production would acknowledge that documents exist which are the property of corporations and that the person subpoenaed believes that the records produced are those commanded.

In our view the Supreme Court in *Fisher* merely substituted a new test for the "mere evidence" standard it had established in *Boyd* v. *United States,* 116 U.S. 616 (1886), for determining whether the compelled production of *personal papers* is privileged. It did not extend Fifth Amendment protection to the production of the records of a corporation or other collective entity. Subsequent to its *Fisher* decision the Supreme Court stated in *Andresen* v. *Maryland,* "It is established that the privilege against self-incrimination may not be invoked with respect to corporate records." 427 U.S. 463, 468 n.2 (1976) (citation omitted).

This and other courts have continued to treat the production of corporate records as being outside the protection of the Fifth Amendment privilege following *Fisher. E.G., In re Grand Jury Proceedings (Shiffman),* 576 F.2d 703 (6th Cir.), *cert. denied,* 439 U.S. 830 (1978); *In re Grand Jury Proceedings,* 626 F.2d 1051, 1053 (1st Cir. 1980); *United States* v. *Davis,* 636 F.2d 1028, 1044 (5th Cir. 1981), *cert. denied,* 454 U.S. 862 (1982). The appellant cites *In re Grand Jury Proceedings (Katz),* 623 F.2d 122 (2d Cir. 1980), where the court remanded for an inquiry by the district court into whether production of public documents would be a testimonial communication under *Fisher. Katz* is distinguishable from the present case in important aspects, and its holding is not nearly so favorable to appellant as he would have us believe. The subpoena was served on an attorney to produce his client's public records. After he had already surrendered all documents referring on their face to his client or a corporation named in the subpoena, the issue arose whether the attorney could be compelled to produce other documents relating to "any company owned, operated or controlled" by his client. It is not clear that all records sought were corporate records; the broad language of the subpoena could apply to sole proprietorships. We do not believe *Katz* requires the result argued for by the appellant.

The appellant makes much of the fact that the government is not certain that all the documents sought from him are in existence. He argues that *Fisher* and *Schlansky* would have been decided in favor of the taxpayers if the IRS had not known of the existence of all the records it sought and clearly identified them in the subpoenas and summonses. This overlooks, again, the fact that the documents sought in the two cited cases were personal records. Because they were personal records the very act of producing them might have provided a necessary link between the taxpayer and the records. The production of the records of a corporation, standing alone, does no more than signify that the person who produces them has them in his possession, necessarily in a representative capacity since corporations can act only through representatives, and that he believes the records produced are those described in the order of production. Any subsequent attempt by the government to convert the act of production into a self-incriminating testimonial act would be subject to a Fifth Amendment challenge. As we pointed out in *Schlansky*,

> If the government should attempt to authenticate the binder and its contents as evidence in subsequent criminal proceedings with proof that they were produced by the taxpayer, a Fifth Amendment objection could be interposed at that time. Such proof would seek to add testimonial value to the otherwise testimony-free act of production.

709 F.2d at 1083.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. Misc. 83-711

IN RE: Grand Jury Empaneled March 8, 1983

ORDER

THIS CAUSE came on for hearing, first, on the Motion of Movant, Jacob F. Butcher, to quash a subpoena duces tecum issued on June 3, 1983 by the United States Grand Jury for this District. The return date of the subpoena was extended, by agreement, to July 19, 1983.

The Motion of Movant Butcher was twofold: First, to quash the subpoena seeking the production of certain records of the companies named in said subpoena (a copy of which is attached hereto and incorporated herein by reference) upon the ground that the production of such records would require Mr. Butcher to incriminate himself in contravention of the Fifth Amendment to the Constitution of the United States; and second, in the alternative, to make an *in camera* filing of an affidavit and memorandum setting forth the reasons that the mere act of production of the records called for in the subpoena might very well incriminate Mr. Butcher.

At the hearing the government stated that the subpoena in question sought only corporate records, not records held in an individual capacity. Counsel for Mr. Butcher admitted that there was no Fifth Amendment privilege available as to the contents of corporate records; counsel contended, however, that under the facts of this case the act of production by Mr. Butcher would be incriminating in that it would, among other things,

constitute testimony of the existence of the records, the possession of such records by Mr. Butcher and the identification and authenticity of such records. It was the position of the government that since the records were corporate records and that only corporate records were called for in the subpoena, Mr. Butcher had not Fifth Amendment rights. As a consequence, the government objected not only to the Motion to Quash but also to the Motion to be allowed to submit *in camera* the affidavit and memorandum setting forth the alleged facts and circumstances explaining and providing the bases for the claim that the act of production itself would be incriminating.

After argument of counsel and upon consideration of the matter, the Court was of the opinion, and therefore held, that Mr. Butcher had no privilege with respect to the production of these records under the Fifth Amendment to the United States Constitution and denied the Motion to Quash. The Court also declined to accept the proposed submission of an affidavit and memorandum allegedly setting forth the bases why the act of production would, in this case, be incriminating and, therefore, the Court denied the Motion to be allowed to make the proposed submission.

Thereafter, Mr. Butcher appeared before the United States Grand Jury for this District on July 19, 1983, and respectfully declined to produce the corporate records sought by the Grand Jury. Thereupon, Mr. Butcher was brought before the Court and was ordered to produce the records. Mr. Butcher, through his counsel, respectfully declined to produce the records.

It is the order of the Court, that Mr. Butcher, having refused in open court on July 19, 1983, to produce those corporate records called for in the attached subpoena, should be held in contempt. It is, therefore, ORDERED that Mr. Butcher be and hereby is held in contempt of Court for failure to comply with the order of Court to produce those corporate records called for in the subpoena and is remanded to the custody of the Attorney General until he complies with this Order.

It is the further Order of the Court that Mr. Butcher should have an opportunity to appeal the decision of the Court denying the Motion to Quash the subpoena, denying the Motion to submit certain documents *in camera* and holding him in contempt. Accordingly, enforcement of the Order of Confinement should be, and hereby is, stayed pending perfection and prosecution of an appeal.

ENTER this 19th day of July, 1983.

/s/ Robert L. Taylor
Judge

APPROVED FOR ENTRY:

John W. Gill, Jr.
U.S. Attorney

By: /s/ Robert E. Simpson
Assistant U.S. Attorney

/s/ James F. Neal
Counsel for Mr. Butcher

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. Misc. 83-711

IN RE: Grand Jury Proceedings:
Motion of Jacob F. Butcher

OPINION AS RENDERED FROM THE BENCH

Jacob F. Butcher moves the Court to quash a subpoena duces tecum issued on June 2, 1983 by a federal Grand Jury for the Eastern District of Tennessee requesting him to produce records of eight companies. These companies are: JFB Petroleum and Land Company, Bull Run Oil Company, Church Petroleum Marketers, Inc., Seaboard Trading Company, Southern Natural Resources, Tri-State Mining Company, Inc., Cumberland Land and Mining Company, Inc., and Natural Energy Mining Company, Inc. The Grand Jury requests original records, including but not limited to, records of cash receipts and disbursements, account statements, cancelled checks, debit and credit memoranda, wire transfers, general ledgers, general journals, records having description and location of assets, minute books, stock ledgers, correspondence, tax returns, financial statements, accountant's work papers.

Mr. Butcher claims that forced production of any documents under his control would violate his right against self-incrimination as guaranteed by the fifth amendment of the Constitution of the United States.

In the opinion of the Court if is settled that a corporation may not invoke a constitutional privilege against self-incrimination. *See Andresen* v. *Maryland,* 427 U.S. 463 (1976). Furthermore, the official records and documents of an organization that are held by an individual in a representative

rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate the individual personally. *In re: Grand Jury Proceedings: Appeal of Shiffman,* 576 F.2d 703 (6th Cir. 1978), *cert. denied,* 439 U.S. 830 (1978). Forced production of private papers; however, has been held to violate an individual's privilege against compulsory self-incrimination. *Boyd* v. *U.S.,* 116 U.S. 616 (1886).

As the Grand Jury in the instant case seeks production of company records held in Mr. Butcher's official capacity, his motion to quash the subpoena duces tecum must be denied.

It is therefore ORDERED that the motion of Jacob F. Butcher to quash the subpoena duces tecum issued June 2, 1983 be, and the same hereby is, denied.

Order Accordingly.

/s/ Robert L. Taylor
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. Misc. 83-711

IN RE: Grand Jury Proceedings
Motion of Jacob F. Butcher

ORDER

For the reasons stated in an opinion as rendered from the bench this day passed to the Clerk for filing, it is ORDERED that the motion of Jacob F. Butcher to quash the subpoena duces tecum issued June 2, 1983 by a federal Grand Jury for the Eastern District of Tennessee be, and the same hereby is, denied.

ENTER:

/s/ Robert L. Taylor
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 337-August Term 1983

Argued: September 28, 1983

Decided: November 1, 1983

Docket No. 83-6256

In Re:

Grand Jury Subpoenas Duces Tecum
Dated June 13, 1983 and June 22, 1983.

Before:

Mansfield, Kearse and Winter,
Circuit Judges.

Appeal by a former corporate officer from an order of the Southern District of New York, Abraham D. Sofaer, *Judge,* holding him in civil contempt for refusal on Fifth Amendment grounds to comply with a grand jury subpoena duces tecum commanding production of corporate records retained by him after he ceased to be employed by the corporation. The witness refused on the ground that the act of production, as distinguished from the contents of the documents, would tend to incriminate him.

Reversed and remanded.

Robert G. Morvillo, Esq., New York, NY (Gilda I. Mariani, Esq., Obermaier, Morvillo & Abramowitz, P.C., New York, NY, of counsel), *for Witness-Appellant.*

Peter J. Romatowski, Assistant U.S. Attorney, New York, NY (Rudolph W. Giuliani, U.S. Attorney for the Southern District of New York, Andrew J. Levander, Barry A. Bohrer, Assistant U.S. Attorneys, New York, NY, of counsel), *for United States of America.*

Mansfield, *Circuit Judge:*

Respondent-appellant, former President of Saxon Industries, Inc. (Saxon) who retained certain of that company's records after leaving its employment, appeals from an order entered in the Southern District of New York by Judge Abraham D. Sofaer holding him in contempt for refusing to produce the documents pursuant to a subpoena duces tecum issued by a grand jury sitting in the Southern District of New York. Appellant is the target of the grand jury's investigation into alleged fraud in the financial statements of Saxon which in 1982 filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act. We reverse and remand.

In June 1983 a grand jury subpoena duces tecum was issued by the district court commanding appellant to produce all records of Saxon, its subsidiaries and division, in his possession.[1] When appellant, who had ceased to be employed

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[1] One subpoena, dated June 13, 1983, directed appellant to produce for Saxon, its predecessor and subsidiary corporations and divisions thereof, and for Camden Industrial Sales Corp. and Mill Factors, originals or, if not available, copies of any and all books, records and documents of whatever description, including but not limited to:

by Saxon in mid-1982, refused to comply, the government on July 7, 1983, moved to enforce the subpoena.[2] Appellant oppos-

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"(a) records of any and all business conducted; including but not limited to notes, memoranda, correspondence, telexes, telephone logs, telephone bills and records, diaries and calendars used in connection with the business, officers', employees' and agents' personal files, contracts, bills, receipts, invoices, purchase orders, shipping records, price lists, brochures, financial statements, accounting and inventory records;

(b) corporate records; including but not limited to certificates of incorporation or partnership, minute books, corporate resolutions, stock certificates and records, corporate kit, corporate seals and stamps, shareholder lists, any lists of officers, employees and agents; and all evidence of the names of the principals or owners of the entities;

(c) bank, brokerage and other financial records; including but not limited to account statements, cancelled checks, deposit tickets, credit and debit memoranda and advices, wire transfers; promissory notes, loan agreements and any and all records pertaining to any and all advances of credit or payments or disbursements to or from the entities;

(d) records pertaining to any and all local, state and federal tax returns or liability, including but not limited to partnership and corporate tax returns, payroll tax returns, payroll Forms W-2, W-3, W-4 and Forms 1099;

(e) evidence of any and all transactions engaged in by [WITNESS] for or on behalf of the entity, whether conducted in his own name or in the the name of the entity, including but not limited to any and all checks or withdrawals of funds drawn by [WITNESS] on any bank account of any of the entities.

B. If any items called for by this subpoena are withheld based upon a claim of privilege or otherwise, state the basis for such withholding and identify the nature of each such item by date, author, and recipient if any, and general contents so as to allow the matter to be litigated."

A second subpoena, dated June 22, 1983, commanded production of similar documents with respect to Mill Group Purchasing Associates, Inc.

[2] Appellant advised that he had no records in his possession with respect to three of the companies.

ed on the grounds that most if not all of the Saxon documents in his possession were duplicates of records already in the government's hands and that his act of producing them would tend to incriminate him in violation of his Fifth Amendment rights, *see Fisher* v. *United States,* 425 U.S. 391 (1976). On August 15, 1983, the district court granted the government's motion, holding that even though production of the documents would tacitly admit their existence and possession in appellant's hands, the possessor was not entitled to assert his act of producing corporate documents as a basis for a claim of compulsory self-incrimination in violation of the Fifth Amendment since "the act-of-production doctrine [enunciated by *Fisher*] only applies, if at all, to the nonrequired records of an individual or sole proprietor. *See United States* v. *Fox,* 554 F. Supp. 422, 425 (S.D.N.Y. 1983)."[1] Appellant appeals from the district court's decision and subsequent order adjudging him in contempt for failure to produce the records.

DISCUSSION

The Fifth Amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." Beginning with *Boyd* v. *United States,* 116 U.S. 616 (1886), and continuing at least until *Fisher* v. *United States,* 425 U.S. 391 (1976), this privilege was construed to protect an individual from compulsory production of all of his personal records that

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[1] Judge Sofaer questioned whether appellant's hand-written notations on some of the documents qualified as "personal" papers but allowed him to move for modification of the subpoena to exclude them. However, no such motion was made.

The district court's decision in *United States* v. *Fox* has since been reversed on the ground that the witness there was entitled to invoke his Fifth Amendment privilege with respect to production of the documents in that case—his sole proprietorship records sought by the IRS in connection with its income tax investigation—which might incriminate him. See *United States* v. *Fox,*____F.2d____, Dkt. No. 83-6055, Slip Op. 7053, Oct. 19, 1983.

might tend to incriminate him. The rationale has been that a person's papers represent his personal communications and that without such protection he could be subjected to coercion designed to extract the evidence from him in the same manner as if he were forced to testify against himself. *Couch* v. *United States,* 409 U.S. 322, 327-28 (1973). To compel production of an individual's communications in oral or written form has been viewed as an invasion of his privacy that is inconsistent with the dignity and intergrity of his person. As we stated in *United States* v. *Beattie,* 522 F.2d 267, 270 (2d Cir. 1975), *vacated and remanded,* 425 U.S. 967 (1976), *modified on remand,* 541 F.2d 329 (2d Cir. 1976), "if an accused is forced to produce his own papers, with the consequence that the prosecutor can put them in evidence without further ado, he is in effect forced to take the stand if he wishes to dispute or explain them."

Thus, under *Boyd* and its progeny, the Fifth Amendment analysis was focused on the nature and content of the subpoenaed documents. On the one hand, private papers were held privileged, provided they were in the personal possession of the person claiming the privilege. *Couch* v. *United States, supra,* 409 U.S. at 333. On the other, an individual was not permitted to invoke the privilege with respect to records of an organization or collective entity. *Wilson* v. *United States,* 221 U.S. 361 (1911) (corporate records); *United States* v. *White,* 322 U.S. 694, 699 (1944) (labor union); *United States* v. *Fleischman,* 339 U.S. 349, 357-58 (1950) (Joint Anti-Fascist Refugee Committee); *McPhaul* v. *United States,* 364 U.S. 372, 380 (1960) (Civil Rights Congress); *Curcio* v. *United States,* 354 U.S. 118 (1957) (labor union); *Bellis* v. *United States,* 417 U.S. 85 (1974) (law partnership).

The reason for not permitting an officer or agent of a separate entity to refuse to produce its organization's records is that the privilege is purely personal and designed to protect the human being, not an artificial entity. The latter, being impersonal, has no human dignity needing protection. Its records are

usually available to others within the entity and may not be treated as the private confidential papers of any one officer or employee. The officer creates or handles the records in a representative capacity, not on his own behalf. The records, moreover, do not belong to him but to the organization. He has no right to use the papers for his personal purposes, at least without the consent of the entity. To compel him to produce corporate records does not invade his personal privacy or violate his dignity or integrity as a person, protection of which is the aim of the Fifth Amendment. In addition, the organization, unlike the individual, is often the creature of the state, subject to visitation, obligated from its inception to make disclosures needed for enforcement of federal and state laws and subject to greater governmental control and regulation than the individual. *Bellis* v. *United States, supra,* 417 U.S. at 88-94.

This "corporate records exception" was a logical reaction to the content-oriented approach of *Boyd.* The scope of the privilege was further reduced by a line of Supreme Court decisions holding that to qualify for the privilege the evidence sought to be withheld by the individual must be not only personal but communicative or testimonial in nature. Requiring a suspect to give a blood test, for instance, is not protected; "blood test evidence, although an incriminating product of compulsion, [is] neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner." *Schmerber* v. *California,* 384 U.S. 757, 765 (1966). *See, in accord, United States* v. *Wade,* 388 U.S. 218, 221-23 (1967) (identification lineup); *Gilbert* v. *California,* 388 U.S. 263, 265-67 (1967) (handwriting exemplars); *Holt* v. *United States,* 218 U.S. 245, 252-53 (1910) (modelling clothing).

In *Fisher* v. *United States,* 425 U.S. 391 (1976), the Court confirmed this narrowing of the protection that an individual may claim under the Fifth Amendment. *Fisher* held that a taxpayer may be compelled by subpoena to produce his accountant's workpapers in the taxpayer's possession. The Court

reasoned that since the Fifth Amendment protected an individual only against compelled testimonial communications it was not violated by a subpoena directing him to produce papers already generated and in existence, which had not been prepared by him but by an independent accountant at his request.

> "A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. *Schmerber* v. *California, supra; United States* v. *Wade, supra;* and *Gilbert* v. *California, supra.* The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." 425 U.S. at 409-10.

At the same time, however, the Court recognized that disclosure of contents of personal papers is not the only method of self-incrimination; a person may under some circumstances incriminate himself by the act of producing documents that tend to incriminate, whether or not they be personal. As the Supreme Court pointed out in *Curcio* v. *United States, supra,* 354 U.S. at

125, "[t]he custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena." This "act of production" doctrine was also confirmed by the Court in *Fisher:*

> "The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio* v. *United States,* 354 U.S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not end themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." 425 U.S. at 410.

In the circumstances of the case before it the Court held that the Fifth Amendment did not entitle the taxpayer to refuse production of the accountant's papers because their existence and possession were not in issue and the taxpayer's production of them did not amount to his authentication of them since they had been prepared by a third party (the accountant). Under these circumstances the Court was "quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer." 425 U.S. at 412.

The Court left for another day the question of whether *Boyd* and its progeny would continue to shield a person from compelled production of his private incriminating papers. Doubt was cast on the continued viability of that long-standing princi-

ple, however, by the Court's shift of concern away from the contents of the subpoenaed documents.[4] Indeed, some view *Fisher* as abandoning *Boyd's* emphasis on the nature or contents of the documents, and as opting instead for an inquiry into the question of whether ordering their production will result in "compelled testimonial incrimination," 425 U.S. at 339. *See* Note, The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of *Fisher* v. *United States*, 95 Harv. L. REv. 683 (1982).

It is against this uncertain backdrop that the witness in this case has tried to invoke the protection of the *Boyd* doctrine. He contends that since he disassociated himself from Saxon more than a year ago and no longer is an officer of that company the former corporate records in his possession, most of which apparently are copies of those retained by the company, have somehow become his personal papers and are therefore entitled under the Fifth Amendment to protection from compulsory disclosure. We disagree with this contention, which borders on the frivolous. The papers concededly belonged to the corporation before he departed with them. There is no evidence that ownership or possession of the papers was lawfully transferred to him; on the contrary, there is evidence that shortly after the company filed its Chapter 11 petition and before his departure he was seen cleaning out files in the company's offices and that he retained some original corporate documents of which no copies were kept by the company. The witness has no right to appropriate to himself corporate documents, whether originals or copies. As the Court noted under similar circumstances in

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[4] It was this doubt that led Justices Brennan and Marshall to write separate concurring opinions divorcing themselves from the implications of the majority opinion that a person might no longer be protected by the Fifth Amendment against production of his private papers except to the limited extent of not being required to admit their existence, authentication and possession if those facts were in issue.

Wilson v. *United States, supra,* 221 U.S. at 385, an officer has "no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize." *See United States* v. *Beattie, supra,* 522 F.2d at 272-73. The contents of the documents, except possibly for any personal notes written on them *after* the witness ceased to be employed by the company, which might be his own personal non-corporate thoughts, are not protected from disclosure by the Fifth Amendment. Thus, whatever the current scope of *Boyd's* protection—a question we do not reach today—these papers do not come within its purview.

The witness' next contention is more troublesome. Invoking *Fisher,* he argues that even if the contents of the corporate documents must be disclosed, he is entitled under the Fifth Amendment to refuse to produce them because his act of producing them would amount to an attestation that he has possession of them. His admission that he possesses them, he argues, when viewed with other circumstances in the case, would provide the basis for an inference that he has guilty knowledge of their potentially incriminating contents and that he removed them from company files to prevent disclosure of his guilty knowledge. His post-employment possession, he contends, is therefore an issue in the case; to require him to engage in the act of producing the documents pursuant to subpoena would amount to testimonial compulsion in violation of his Fifth Amendment rights.

The district court did not resolve this claim, choosing instead to accept the government's position that the *Fisher* act of production doctrine simply does not apply to corporate records. We believe that the district court erred in rejecting this contention out of hand solely on the ground that corporate documents were demanded by the subpoena. Under *Fisher* the standard is not the potential incriminating nature and contents of the documents subpoenaed but whether their mere production would itself tend to incriminate the possessor. It is true that if

the witness were still a Saxon officer or employee he would normally be obligated as a representative of the company to produce its documents, regardless of whether they contained information incriminating him, *Bellis* v. *United States, supra,* 417 U.S. at 88-89; *United States* v. *White, supra,* 322 U.S. at 699, or were written by him as a corporate officer, *Wilson* v. *United States, supra,* 221 U.S. at 378; *Fisher* v. *United States, supra,* 425 U.S. at 410 n.11; *United States* v. *Beattie, supra,* 522 F.2d at 271-74. But that is because there would rarely be any dispute over possession when the person subpoenaed is required to respond in his representative capacity. In producing records as an officer of the company he would not be attesting to his personal possession of them but to their existence and possession by the corporation, which is not entitled to claim a Fifth Amendment privilege with respect to them.

Once the officer leaves the company's employ, however, he no longer acts as a corporate representative but functions in an individual capacity in his possession of corporate records. Although his possession of them as a private citizen may have been derived from his wrongful misappropriation of them from the corporation, we do not view such conduct as depriving him, once the documents are in his personal possession (rather than as a corporate representative), of his right under the Fifth Amendment to invoke the act of production doctrine outlined in *Fisher.* It is elementary that a person need not be guiltless to qualify for invocation of the Fifth Amendment. For the purpose of determining the extent to which a natural person may invoke his Fifth Amendment privilege under *Fisher,* the fact that the subpoenaed documents in his possession were prepared by a corporation is not directly relevant. The *Fisher* doctrine simply does not turn on either content or authorship of the documents; it is the fact, and the circumstances, of *possession* that are controlling. *Couch* v. *United States, supra.* If, as the Supreme Court indicated in *Fisher,* the act of production doctrine applies to one type of otherwise unprivileged document (accountant's workpapers) it can apply as well to corporate

records in an individual's possession. Indeed, in *In re Katz,* 623 F.2d 122, 125-26 (2d Cir. 1980), we held that under the circumstances of that case the act of production doctrine was applicable to a grand jury subpoena for corporate documents.[5] To the extent that only a portion of the Saxon documents might have a self incriminating effect, the District Court may utilize appropriate procedures to determine which documents are and which are not subject to the privilege.

There remains the question of whether the witness' compelled production of the records in this case, quite aside from their contents, could reasonably be viewed as tending to incriminate him. In *Fisher* the Court held that the question does not lend itself to a categorical answer but must "depend on the facts and circumstances of particular cases or classes thereof." 425 U.S. at 410. Since the taxpayer's possession of his tax accountant's records in that case was undisputed and unlikely to incriminate him his production of the subpoenaed documents did not pose "any realistic threat of incrimination." 425 U.S. at 412. It is undoubtedly true, as the Court recognized, that in most cases the possession and production of documents by the person subpoenaed would add "little or nothing to the sum total of the Government's information." 425 U.S. at 411. But the sub-

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[5] The government argues that for purposes of determining the applicability of the act of production doctrine corporate documents should be treated the same as required records kept pursuant to a regulatory scheme, *Shapiro* v. *United States,* 335 U.S. 1 (1948), production of which is not protected by the Fifth Amendment. *In re Doe,* 711 F.2d 1187, 1192-93 (2d Cir. 1983); *In re Grand Jury Proceedings,* 601 F.2d 162, 171 (5th Cir. 1979). We disagree. The governmental requirement that they be kept implies an obligation to produce them upon the government's demand, which amounts to a waiver of any Fifth Amendment claim with respect to the act of production. Moreover, since they are required to be kept, production of them can hardly provide the basis for an inference of criminality in possessing them. For these reasons the exception with respect to production of required records does not apply to production of corporate records of the type kept here.

poenaed witness here has advanced a colorable claim that his formal testimonial admission by his production of the documents that he possesses them would tend to corroborate evidence that he misappropriated this evidence from Saxon; it would thus enable the government to argue in any criminal proceeding against him that his removal of the documents from the company's files amounted to a tacit admission that he had knowledge of their incriminating contents and absconded with them because he believed they were "smoking gun" evidence of his guilt. Accordingly we remand the case to the district court to determine, after considering such relevant evidence as the parties may offer, whether appellant's production of the Saxon documents, regardless of their contents, might have the self-incriminatory effect ascribed thereto by appellant.

We note, however, that should production itself be potentially incriminatory, the government could either by stipulation or by obtaining a grant of immunity pursuant to 18 U.S.C. §§ 6002-6003, immunize the act of production; such immunity would preserve the appellant's Fifth Amendment rights with respect to his conduct in producing the documents, *Kastigar* v. *United States,* 406 U.S. 441 (1972).[6] As for any post-employment notes written by appellant on the documents the district court may determine by *in camera* inspection whether they are protected from disclosure. *See United States* v. *Fox, supra,* note 3.

Reversed and remanded for further proceedings consistent with the foregoing.

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[6] Indeed the government has conceded that the problem of self-incrimination through act of production could be obviated by immunization. Gov't Brief at 4.